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Supreme Court, U.S.
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No

In the Supreme Court of the United States

ANDRI MOLI, VITORI MOLI, FISNIK MOLI,

Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the First Circuit Court of Appeals deny the Petitioners their fundamental rights to due process under the Fifth Amendment by misapplying the substantial evidence standard and by relying too heavily on reports issued by the Department of State regarding country conditions to summarily dismiss the Petitioners' appeal of an agency finding in contravention of its own precedent and without considering the substantive underlying arguments?

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Petitioners, Andri Moli, Vitori Moli and Fisnik Moli ask that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

CITATION TO OPINIONS BELOW

The decisions of the United States Court of Appeals for the First Circuit, *Moli et al., v. Gonzales*, Docket No., 06-2413 (1d Cir. 2007), are attached to this petition as **A-1, A-2 and A-4**. The agency opinion issued by the Board of Immigration Appeals, *In re Andri Moli et al*, Nos. 95-477-484/97-485-539/97-485-540 (BIA September 8, 2006), is attached hereto as **A-6**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying the timely submitted petition for rehearing on May 7, 2007. The mandate was subsequently issued by the First Circuit on May 15, 2007. The Court of Appeals denied the Moli's timely petition for review of the decision of the Board of Immigration Appeals on March 12, 2007. The order denying review of the agency appeal is attached hereto as **A-4**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive the Moli family of their rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the substantial evidence standard, as a means of reviewing a claim for asylum. The Circuit Court in applying the substantial evidence standard to review the matter of Mrs. Vitori Moli and her two sons, Fisnik and Andri Moli misapplied the standard by failing to review the record in a cumulative manner, and further relied on Country Reports prepared by the State Department to rebut their fear of future persecution in their native country in the face of countervailing precedent which seeks to diminish the probative value of such reports within its own precedent. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mrs. Moli and her two sons' Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

The Molis are natives and citizens of Albania who suffered persecution in their native country of Albania. The Molis arrived in the United States after applying for a visa abroad. Mrs. Moli came to U.S. on March 5, 2003. She timely filed for asylum in July of 2003, and her case was consolidated with that of her older son, Andri. Her son Fisnik Moli was classified as a derivative applicant. On March 10, 2005, Mrs. Moli and her two sons appeared before the Immigration Judge Francis L. Cramer, who denied their application for asylum and related relief.

Mrs. Moli and her son submitted ample corroborating evidence which included documents from the political organizations, the Democratic Party and the Formerly Persecuted Association, medical documents verifying the attacks and medical treatment as well country conditions regarding Albania: and the Profile of Asylum Claims and Country Conditions by U.S. Department of State; Country Reports on Human Rights and Practices-2003 and other

supporting articles. The country conditions reports which were submitted relative to the Molis' claims were the U.S. Department of State Country Report for Albania for the year 2003 (released on February 25, 2004), Reports from Amnesty International and other reputable sources. The Immigration Judge ultimately denied the Molis' claims because he did not deem the harm Mrs. Moli and her son, Mr. Andri Moli had suffered to constitute past persecution, and moreover, that they did not have a well-founded fear of persecution because, in his view, conditions in Albania had sufficiently improved. With respect to the question of country conditions in Albania, the Immigration Judge relied on the State Department reports and declined to consider all other submitted reports. The Immigration Judge discounted the Molis' testimony in favor of the State Department reports, and found their testimony to be incredible. (See A-12 and A-16). The Moli family submitted a timely appeal to the Board of Immigration Appeals soon thereafter, arguing that the Immigration Judge had placed too much weight on the State Department Reports and had further impermissibly allowed the use of a 2005 Country Report to rebut the fear of future persecution. The appeal urged the Board to reconsider the decision of the Immigration Judge to allow for the proper evaluation of the whole record, and evidence submitted to consider whether the applicants had met their burden in demonstrating both a fear of past and future persecution. On September 8, 2006, the Board of Immigration Appeals affirmed the Immigration Judge's decision. See **A-6**.

On October 5, 2006, the Molis filed a petition for review of the agency's determination with this Honorable Court. In a short order decision, the First Circuit denied the petition for review on March 12, 2007. See **A-4**. The First Circuit simply issued a decision finding that under the substantial evidence standard, the Board of Immigration Appeals had properly denied the appeal.

The Moli Family asserts that the Court of Appeals for the First Circuit in contravention of precedent violated their rights under the Fifth Amendment to due process of law, by misapplying the substantial evidence standard, in their failure to review the record as a whole, and further in relying erroneously on State Department Records which have little probative value to rebut the claim of future persecution.

II. ARGUMENT IN SUPPORT OF PETITION

A. The Court of Appeals for the First Circuit arbitrarily and capriciously misapplied the substantial evidence standard in reviewing the merits of the Petitioners' case for the relief of asylum

The Petitioner respectfully contends that the Court of Appeals for the First Circuit arbitrarily misapplied the substantial evidence standard in the instant matter. This Honorable Court should review the decision of the First Circuit Court below, as the decision entered was in contravention of the Court's precedent and arbitrarily and capriciously failed to investigate whether the decision to deny relief to the Petitioners could pass muster under the substantial evidence standard which has been elaborated by this Honorable Court. *See INS v. Elias- Zacarias*, 502 U.S 478, 481 (1992); *See also Wiransane v. Ashcroft*, 366 F.3d 889, 887 (10th Circ. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1086 (7th Cir. 2004). In so finding, the First Circuit Court of Appeals merely adopted the Board's finding that the Petitioners had not conclusively proven to the satisfaction of the Court below, that the events which they had endured in their native country amounted to persecution and as such evidence presented of the suffered mistreatment

merited a favorable consideration for the relief of asylum, withholding of removal and relief under Article III of the United Nations Convention Against Torture. Petitioners posit that this was arbitrary and capricious finding by the lower court, and demonstrated a lack of prudent application of the substantial evidence standard.

In the context of immigration matters, he substantial evidence test is the applicable standard of review of removal decisions. See INA §242(b)(4)(B), 8 U.S.C. §1252(b)(4)(B). Under the substantial evidence standard, a final agency determination will be reversed if it is not supported by "reasonable, substantial and probative evidence on the record as a whole." See 8 U.S.C §1105 (a)(4). See also *INS v. Elias-Zacarias*, 502 U.S 478, 481 (1992). Traditionally, the substantial evidence test requires that the reviewing agency in determining matters rely on more than a "scintilla" of evidence and that it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See also Richardson v. Perales*, 402 U.S. 389, 401 (1971) *See also Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006). Accordingly, in order to find that such a scintilla of evidence exists, the Court is bound to review the evidence submitted as to evaluate whether the evidence being offered is so "relevant [...] as a reasonable mind might accept as adequate to support a conclusion." See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1961), this Honorable Court further elaborated the appropriate standard for the application of the substantial evidence test finding that in order to be properly deemed applied the evidence being proffered *must be substantial* after taking into account "whatever in the record detracts from its weight." Under the substantial evidence standard, the final agency determination will be reversed if not supported by "reasonable, substantial and probative evidence

on the record as a whole." *See* 8 U.S.C. §1105 (a)(4); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Secaida-Rosales v. INS*, 331 F.3d at 305 (2d Cir. 2003) (*quoting Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)). In this case, the "record as a whole" does not support the Board's decision below. Further, the subsequent affirming decision to deny the petition for review by the First Circuit compels a different conclusion because the Board dismissed Mr. Andri Moli's and his mother's detailed and specific testimony that they suffered persecution in Albania on account of their participation in the Democratic Party. Where, as in the instant matter, the Court of Appeals for the First Circuit is apprised of a matter which comes before it for review, such review of the record should be conducted "as a whole." In the decision below, the Board of Immigration Appeals erred in finding that the Petitioners had not established that the events which they suffered amounted to persecution within the meaning of the Immigration and Nationality Act, specifically, INA§ 208 A review of the "record as a whole" shows that Mr. Andri Moli and Mrs. Moli submitted a valid and credible claim for asylum. The Board's decision is not supported by reasonable, substantial and probative evidence when the record is considered as a whole. The Board did not consider the numerous evidentiary documents and the testimony presented to the Court which purports to show conclusively that the Moli family has reason to fear a forced return to their native country due to their political activism and the resultant abuse they suffered for their views and support of democratic principles in Albania.

In the asylum, withholding and CAT context, the substantial evidence standard mandates reversal only where the reviewing court finds that the evidence not only supports a contrary conclusion, "*but compels it.*" *INS v. Elias-Zacarias*, 112 S.Ct. 812, 815 n.1 (1992) (emphasis added). In *Palavra v. INS*, 287 F.3d 690 (8th Cir. 2002) the court relied on the standard in *Universal Camera Corp.* and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and reversed the

finding of removal for failure to consider evidence which was contained in the record. Similarly, sister Courts to the First Circuit in applying this standard have found that a decision to deny relief cannot be supported when it fails to comply with these tests. Specifically, in *Ding v. Ashcroft*, 387 F.3d 1131, 1136 (9th Cir. 2004), an Immigration Judge's decision was reversed in Chinese forced abortion and birth control opposition case because the Immigration Judge had made an adverse credibility finding which was ultimately found to be unsupported by substantial evidence as it was based upon speculation, conjecture and an inappropriate legal standard. Similarly also, in *Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001), the Second Circuit reversed the Board of Immigration Appeal's denial of asylum and noted that more than a mere scintilla of evidence was necessary to compel a conclusion of a negative finding. Various other matters seeking the analogous relief of asylum, withholding and relief under Article III of the Convention Against Torture have come under consideration in courts below with regard to the appropriate application of the substantial evidence standard. *See e.g Uwase v. Ashcroft*, 349 F.3d 1039 (7th Cir. 2003)(*reversing* IJ determination not based upon substantial evidence and where undue weight was given to lack of corroborating testimony); *Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003) (*reversing* denial of asylum where BIA failed to support its findings by substantial evidence and failed to consider key elements in the record); *Georgis v. Ashcroft*, 328 F.3d 962, 967–70 (7th Cir. 2003) (*reversing* denial of asylum under *Elias-Zacarias* standard where minor inconsistencies would have been easily resolved by other facts in evidence and could have been explained by improperly excluded evidence); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (*reversing* Board's adverse credibility determination under the substantial evidence standard).

B. **The reliance upon Department of State Country Reports on Human Rights Practices by the Court of Appeals for the First Circuit to rebut a claim of a well-founded fear of future persecution within the context of asylum/removal proceedings was inapposite and arbitrary.**

1. **Department of State Country Reports on Human Rights Practices are insufficient to conclusively rebut a claim of a well-founded fear of future persecution.**

Even where this Honorable Court finds that the Court of Appeals did not act arbitrarily in failing to apply correctly the substantial evidence standard in the instant matter, this Court should review the decision of the First Circuit on the basis that the use of the State Department Reports fails to effectively rebut the presumption of future persecution for the Petitioners. To be eligible for a grant of asylum, an alien must first show that he or she is a "refugee" within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). To make this showing, an alien must prove that he or she is either unable or unwilling to return to his or her country based upon past persecution suffered or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). "Persecution," as employed in the statute, has been defined by the Board of Immigration Appeals and generally accepted by the United States Circuit Courts of Appeals as meaning "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded offensive." *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Li v. Attorney General of the U.S.*, 400 F.3d 157 (3d Cir. 2005); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir.

1986). Where an alien establishes that he or she has suffered past persecution, there ensues a rebuttable presumption that such alien has a well-founded fear of future persecution. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 176 (2d Cir. 2004) (*citing* Melgar *de Torres v. Reno*, 191 F.3d 307, 311 (2d Cir. 1999)). *See also Chen v. INS*, 359 F.3d 121, 134 (2d Cir. 2004) (*stating*: "[i]f an applicant establishes that he has suffered past persecution, he shall be presumed to have a well-founded fear of future persecution on the basis of the same claim"). Alternatively, where an alien seeks to establish his or her status as a refugee upon a showing that he or she holds a well-founded fear of future persecution, the alien must present credible testimony that he subjectively fears persecution and establish that his fear is objectively reasonable. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 176 (2d Cir. 2004) (*citing Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999)). An alien who has not suffered past persecution is nonetheless eligible for the relief of asylum or withholding of removal based on a fear of future persecution. *See Alvarez-Flores v. INS*, 909 F.2d 1(1st Cir. 1990); *See Kratchmarov v. Heston*, 17 F.3d 551 (8th Cir. 1999); *INS v. Cardoza-Fonseca*, 767 F.2d 1448 (9th Cir. 1986).

Under 8 C.F.R. §§208.13(b)(1)(i), 1208.13(b)(1)(i) an applicant who establishes past persecution is presumed to have a well founded fear of future persecution. The fear of persecution experience by an applicant for asylum in the future can however be rebutted by a showing by the government that the alien no longer has reason to fear persecution or harm. The government may effectively rebut the presumption of a future fear of persecution by demonstrating either 1) that there has been a *fundamental change in circumstances* such that the applicant no longer has a well founded fear; 2) that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality. *See* 8 C.F.R. §§208.13(b)(1)(i)(A) & (B), 1208.13(b)(1)(i)(A) & (B).

A given alien's claim for asylum must necessarily be understood within the context of the current political situation existing in such alien's native country. *See Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002) (*remanding* to the BIA for more current reports where there was a four-year delay between the BIA decision and the IJ decision which relied on a five-year-old State Department Country report); *See Asasni v. INS*, 154 F.3d 719, 725-26 (7th Cir. 1998) (*remanding* the matter to the BIA to permit applicant to file a motion to reopen where conditions changed in country subsequent to BIA denial); *See Cordero-Trejo v. INS*, 40 F.3d 482, 490-91 (1st Cir. 1994) (*reversed* BIA denial of asylum where testimony and evidence not considered "in light of general conditions" in country as required by 8 C.F.R. §208.13(a)). To this end, the Board of Immigration Appeals has taken a view to requiring the inclusion of general background information about the alien applicant's native country in the record of proceedings as a foundation for the alien's claim. *See also Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997) (*criticizing* uncorroborated claims about country conditions). The Board of Immigration Appeals has asserted its reliance on the Profile of Asylum Claims and Country Conditions reports issued by the Department of State, which are prepared pursuant to 8 C.F.R. §§208.11(a), 1208.11(a), and the United States government's view of country conditions in specific countries, and frequently regards the findings set forth in such reports as dispositive of issues pertaining to country conditions within the context of asylum/removal proceedings. *See Matter of R-S-H- et al.*, 23 I&N Dec. 629, 643 (BIA 2003) (In a case involving Lebanon the Board of Immigration Appeals emphasized that the Immigration Judges and the Board frequently rely on Department of State Country Reports); *See Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (*denying* asylum based on a finding of no evidence of country wide persecution pursuant to a Department of State profile for Peru stating that Sendero

Luminosa have reduced ability to act and operate in only in only a few areas of Peru); *See Matter of V-T-S-*, 21 I&N Dec. 792, 798-799 (BIA 1997) ("Country condition profiles described by the State Department have been found to be 'the most appropriate and perhaps best resource for information on conditions in foreign nations.'")

Even where such documents are used frequently in courts to provide a view of the conditions existent in foreign nations, the probative value and weight accorded to such reports ought to be limited. Courts use these reports in the context of asylum/removal proceedings when introduced for the purpose of rebutting a presumption of a well-founded fear of future persecution pursuant to a finding of past persecution, or alternatively to rebut a claim of a well-founded fear of future persecution. Specifically of concern is the disregard of the relative impartiality of the reports, and the circumstances attendant to their issuance, in utilizing the reports as conclusive authority of the conditions in a given country. The Reports by the Department of State do not provide an adequate basis, due to their unreliability and the vagueness of their language to conclusively provide a rebuttal to the fear of future persecution. At least one Circuit Court of Appeals has noted that Department of State Country Reports may be more akin to litigation documents than accurate analyses of a country's prevailing conditions, and other courts have cautioned against the use of country reports as a means of discrediting an applicant's testimony. *See Koliada v. INS*, 259 F.3d 482, 487-88 (6th Cir. 2001) (In referring to the State Department reports the court found that: "It stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view."); *See Mece v. Gonzales*, 415 F.3d 562, 573 (6th Cir. 2005) (*finding* that simply because there is a difference of opinion between the Department of State report and the respondent's description regarding the political coloration of the Socialist government in Albania,

the differing descriptions do not reflect on respondent's credibility); *See Tian-Yong Chen v. INS*, 359 F.3d 121, 130 32 (2d Cir. 2004) (*finding* that the court should not place "excessive reliance" on State Department reports which "are sometimes skewed toward the governing administration's foreign-policy goals and concerns" including "half-truths about human rights abuses in friendly countries.") These reports have no probative value whatsoever, and courts have found that State Department reports relating country conditions are more like litigation documents than accurate analysis. *See Koliada v. INS*, 259 F.3d 482, 487-88 (6th Cir. 2001). The Sixth Circuit in *Koliada* referred to the State Department reports and found that they were essentially manufactured documents which purport to bolster the litigation position of the government: "It stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view." Id at 487-88.

Similarly, one court has stated that the State Department records should not accorded wide latitude of credence given the tendency to oversimplify the situation in foreign nations. Courts have stated that the reports "cannot substitute for an individualized determination of an asylum or withholding claim; we have cautioned against 'over-reliance' on the Country Reports because of their potential for bias and the inability of asylum seekers to question their conclusions." *See Zheng v. Gonzales*, 409 F.3d 804, 810–11 (7th Cir. 2005); *See also He Chun Chen v. Ashcroft*, 376 F.3d 215, 225–26 (3d Cir. 2004) (Court criticized the heavy reliance on "nothing more" than the DOS Country Report because such Reports are not the "Holy Writ" and the BIA "cannot hide behind the State Department's letterhead")); *See Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003) (holding that the letters of Director of Office of Country Reports and Asylum Affairs in DOS reports are double and triple hearsay). *See Galina v. INS*, 213 F.3d 955,

958–599 (7th Cir. 2000) Statements in Country Reports are not only not incontestable, they "are not even facts"; "[T]he Board should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ."); *See also Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997) ("There is perennial concern that *the Department soft pedals human rights violations by countries that the United States wants to have good relations with*") (emphasis added). Given the real concerns of these courts in assessing the probative value of the Department of State records, the issue begs determination by this Honorable Court, and a writ of certiorari is appropriate to provide definitive guidance on the value of such reports.

2. The Federal Circuit Courts of Appeals are not in agreement as to the probative value of Department of State Reports as applicable in the context of asylum/removal proceedings, thus presenting a federal question reviewable by this Honorable Court.

The Circuit Court of Appeals are sharply divergent over the sufficiency and value of the Country Reports offered by the Department of State. There is a decided split in the circuit courts with respect to the probative value of Department of State country reports presenting a federal question for review by this Honorable Court. Some circuits allow for "administrative notice" of facts and opinions set forth in Department of State reports. *See e.g., Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) (*finding inter alia* that the State Department profile reports are "highly probative ... in a well founded fear case" and further finding that in "most cases" such reports will provide substantial evidence which can conclusively be used to overcome the presumption of future fear of persecution) *See also, Vaduva v. INS*, 131 F.3d 689 (7th Cir. 1997) (*finding* INS overcame presumption based on its proffer of a State Department

report for the country of Romania, however the court rejected the proffer of an Amnesty International report). Other Courts have taken a view to assigning them very little evidentiary weight resulting in the soft-peddling of persecutory conditions in the alien's native country in the interest of diplomacy. *See e.g Leiva-Montalvo v. INS*, 173 F.3d 749, 751–52 (9th Cir. 1999) (INS introduction of State Dept. report describing improvements in human rights situation insufficient to overcome presumption); *See also Del Carmen Molina v. INS*, 170 F.3d 1247, 1250 (9th Cir. 1999) (*Ruling* that in rebutting the fear of future persecution the onus is to show how changed country conditions "will affect the specific petitioner's situation ... Information about general changes ... is not sufficient."); *See e.g. Duarte de Guinac v. INS*, 179 F.3d 1156, 1163–64 (9th Cir. 1999) (*finding* that Guatemalan Profile failed to rebut specific facts of persecution suffered by the Respondents).

In deciding the matter at hand, the Court of Appeals – and the Board specifically- relied on the evidence presented by the Department of State records in assessing the objectiveness of the future fear held by the Petitioners. The issue of whether Department of State records are in fact a sufficient harbinger of the situation in Albania as it relates to the future fear of the Petitioners or for that matter, of any applicant for asylum who bases the gravamen of their case on the future fear of persecution is not settled. Sister courts are not in agreement over the usefulness of the Department of State records, or Country Reports professing to provide an accurate picture of the situation in any given country. At least one court has recognized that "a State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution." See *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). *See also Ali v. Ashcroft*, 394 F.3d 780, 788 (9th Cir. 2005)(*holding* that a past persecution claim cannot be rebutted by relying on general conditions in a country

contained in a DOS report). Similarly, the Eighth Circuit has followed the Ninth Circuit in demanding that Department of State reports be evaluated more stringently to assess whether they actually speak directly to the matter before such reports can be used to rebut effectively a fear of future persecution based on changes in country conditions. *See Awale v. Ashcroft*, 384 F.3d 527, 531–32 (8th Cir. 2004) (*finding* that the administrative record, which included the State Department report, was inadequate in that it did not contain substantial evidence rebutting past persecution because of changed country conditions in Somalia.). Similarly, in *Berishaj v. Ashcroft*, 378 F.3d 314, 326–28 (3d Cir. 2004), the Third Circuit ruled that where:

> [T]he Immigration Judge misapplied the law in concluding that changed conditions in Montenegro have obviated any persecution claim that Berishaj might once have had. In such a posture, the burden of showing changed country conditions is on the government... we hold that the government must rebut the alien's well founded fear of future persecution with specific evidence, which it did not produce. See *Berishaj v. Ashcroft*, 378 F.3d 314, 326–28 (3d Cir. 2004)

In *Berishaj*, *(supra)* the Third Circuit warned against complete reliance on these Country reports and discredited their probative value:

> In many cases in which country conditions are at issue, the administrative records are *grossly out-of-date, requiring us to engage in the rather artificial exercise of ruling on situations that existed several years in the past, but do not exist today*. Here, we work from an administrative record in which the most recent country conditions report is over four years out-of-date. While *SEC v. Chenery Corp.*, 318 U.S. 80, 87 L.

> Ed. 626, 63 S. Ct. 454 (1943), and the constraints of process-based review of administrative decision making prevent us from supplementing a grossly out-of-date administrative record, they do not command blindness to the emerging pattern of stale records. Considering the rapid, frequent political changes in countries from which asylum and CAT applicants usually come, and the potentially dire consequences of sending such an applicant back to his country of origin to face possible persecution or torture on the basis of such a stale report, we call on Congress, the Department of Justice, the Department of Homeland Security, and the BIA to improve the structure and operation of the system, so that all may have the confidence that the ultimate disposition of a removal case bears a meaningful connection to the merits of the petitioner's claim(s) in light of contemporary world affairs. *Id.* at 328. (Emphasis added)

While authority exists that purports to discredit such reports, some courts have desperately clinged to the notion that the State Reports provide an adequate account of the conditions existent in a country. The Seventh Circuit has ruled in *Brucaj v. Ashcroft,* 381 F.3d 602, 605–08 (7th Cir. 2004) that the Government met the burden and effectively did rebut an ethnically Albanian-claimant of persecution by presenting country reports and demonstrating regime political changes in the structure of governance in the former Yugoslavia. Similarly, the First Circuit has adamantly relied on these reports, stating that "the Board of Immigration Appeals is entitled to rely on the State Department's country reports as proof of country conditions described therein, although it must also consider evidence in the record that contradicts the State Department's descriptions and

conclusions." *See, e.g., Zarouite v. Gonzales*, 424 F.3d 60, 63-64 (1st Cir. 2005). See also *Waweru v. Gonzales*, 437 F.3d 199, 203–05 (1st Cir. 2006) (*affirming* an Immigration Judge's finding that past persecution from Kenya under the Moi regime was rebutted while abstaining to conclusively deciding whether a particularized showing of changed country conditions was warranted). *But see Mihaylov v. Ashcroft*, 379 F.3d 15, 23 (1st Cir. 2004) (*finding* that changes in a political regime does not necessarily rebut past persecution as it does not "necessarily eliminate the objective basis for an applicant's fear of persecution at the hands of his former oppressors.") In *Mihaylov, supra*, the First Circuit reversed an Immigration Judge's decision denying asylum from Bulgaria based on lack of credibility and rebuttal of past persecution through changed country condition after the regime which the respondent feared was no longer in power. As such, it is clear that the issue is not well settled in the First Circuit, where the Court of Appeals has acknowledged that a tension exists with respect to the sufficiency and value of country reports:

> Some of our decisions suggest that changed country conditions cannot suffice without a more particularized showing, *see, e.g., Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 24-25 (1st Cir. 2005), and some suggest the contrary, *see, e.g., Quevedo v. Ashcroft*, 336 F.3d 39, 44 (1st Cir. 2003); but the reconciling (and most accurate) proposition is that changed country conditions "do not *automatically* trump" the applicant's specific evidence. *Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998) (emphasis added); *see also Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 36 (1st Cir. 2005). The surrender of the British at Yorktown in 1781 did not negate the potential threat to Tories; it probably did as to the Patriots. See *Waweru v. Gonzales*, 437 F.3d 199, 203–05 (1st Cir. 2006)

By so affirming the decision of the BIA, the decision of the Court of Appeals for the First Circuit is at variance with the decisions of other U.S. Courts of Appeals with respect to the weight to be accorded to country conditions reports issued by the U.S. Department of State, as well as with the very cases decided by the First Circuit in *Tota v. Gonzales*, 457 F.3 161 (1st Cir. 2006) and *Alibeaj v. Gonzales*, 469 F.3d 188 (1st Cir. 2006). In *Tota*, this Court noted that

> While "[t]he advice of the State Department is not binding," *Gailius v. INS*, 147 F.3d 34, 45 (1st Cir. 1998) (citations and internal quotation marks omitted), State Department reports are "generally probative of country conditions." *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 36 (1st Cir. 2005). Evidence in these reports *never "automatically trump[s]" petitioner's specific evidence*, *Waweru v. Gonzales*, 437 F.3d 199, 203 (1st Cir. 2006) (citations and internal quotation marks omitted) (emphasis in original), and is "open to contradiction." *Zarouite v. Gonzales*, 424 F.3d 60, 63 (1st Cir. 2005). Further, "*abstract evidence of generalized changes in country conditions, without more, cannot rebut a presumption of a well-founded fear of future persecution.*" *Palma-Mazariegos*, 428 F.3d at 35. [Emphasis Added].

Similarly, in *Tian-Yong Chen v. INS*, 359 F.3d 121 (2nd Cir. 2004), the U.S. Court of Appeals for the Second Circuit stated that

> . . . State Department reports are usually the result of estimable expertise and earnestness of purpose, and they often provide a useful and informative overview of conditions in the applicant's home country. But their

> observations do not automatically discredit contrary evidence presented by the applicant, and they are not binding on the immigration court. [Citations omitted.] Thus, where a report suggests that, in general, an individual in the applicant's circumstances would not suffer or reasonably fear persecution in a particular country, the immigration court may consider that evidence, *but it is obligated to consider also any contrary or countervailing evidence with which it is presented*, as well as the particular circumstances of the applicant's case demonstrated by testimony and other evidence. [Emphasis Added.]

Given the divergence of the Courts, the issue of whether State Department reports and Country Conditions ought to be considered probative and authoritative to rebut claims by applicants such as the Molis of a fear of future persecution if forced to return to their native countries merits review by this Honorable Court. Thus, by granting certiorari in this matter, this Honorable Court can settle the question of the incongruity within the various courts.

C. The probative value accorded to and the consideration of the Department of State Country Report on Albania by the Court of Appeals for the First Circuit as a basis to discredit Petitioners' claim of a well-founded fear of future persecution, was inappropriate and violative of the Fifth Amendment.

1. The Court of Appeals for the First Circuit acts in contravention of the Due Process guarantees set forth in the Fifth Amendment by requiring alien asylum

applicants to meet substantially different burdens of proof to rebut Department of State Reports.

The Fifth Amendment to the Constitution grants, in pertinent part, due process of law before a person can be deprived of life, liberty or property. *See* U.S. Const., Fifth Amend. It is well settled that this Honorable Court has extended Fifth Amendment guarantees of the due process of law to aliens in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 307 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). This Honorable Court has held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

At stake in removal proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the petitioning aliens. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. *See Bridges v. Wixon*, 326 U.S. 135 (1945); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ng Fung Ho v. White*, 259 U.S. 276 (1922). The burden of proof for establishing eligibility for asylum in removal proceedings lies with the petitioner. *See Diab v. Ashcroft*, 397 F.3d 35, 39 (1st Cir. 2005); 8 C.F.R. § 1208.13(a). This burden can be met by proving past persecution or a well-founded fear of future persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1). An applicant's testimony alone, "if credible, may be sufficient to sustain the burden of proof without corroboration," 8 C.F.R. § 1208.13(a), but if the applicant is found not to be entirely

credible, corroborating evidence "may be used to bolster an applicant's credibility." *Diab*, 397 F.3d at 39.

Department of State country reports are almost invariably admitted into evidence during the course of removal proceedings based on a claim of asylum, and are used concomitantly to corroborate and/or discredit an applicant's testimony at trial. Particularly problematic is the use of such reports to conclusively rebut a presumption or claim of a well founded fear of future persecution, as such a finding improperly effectuates a shifting of the burden of proof back to the alien. Thus, aliens who have established a claim of well founded fear of future persecution and whose proceedings are before a circuit that deems Department of State reports to be of substantial probative weight, must effectively bear an increased burden of proof when the report is used by the government to conclusively rebut such claim and shift the burden back to the alien. In contrast, a similarly situated alien in a circuit that assigns little probative weight to the state reports would benefit from a higher threshold showing by the government, before his or her claim of a well founded fear of persecution is successfully rebutted and the burden is shifted back to the alien. This disparate employ of State Department reports as conclusive evidence to discredit an alien's claim of a well founded fear of persecution has the perverse effect of requiring similarly situated alien asylum applicants to meet substantially different burdens of proof depending upon the circuit that the alien's proceedings are before. Given the substantial liberty interests at stake in asylum proceedings, the judicial process afforded to alien asylum applicants must necessarily entail more than a fortuitous application of evidentiary standards for their right to due process pursuant to the Fifth Amendment to be preserved. The incongruent treatment of Department of State reports by the circuit courts within the context of removal/asylum proceedings thus undermines the due process guarantees afforded to aliens in removal/asylum proceedings. As such, adjudication as to the probative value

of State Department country reports by this Honorable Court is merited.

2. **The Court of Appeals for the First Circuit's basis for its decision on a Department of State Country Report issued subsequent to the close of the record in the proceedings under review without giving opportunity for submission of additional evidence and testimony is in contravention of the Due Process guarantees set forth in the Fifth Amendment.**

Pursuant to 8 C.F.R. §1003.1(d)(3)(iv), the Board of Immigration Appeals may take administrative notice of "commonly known facts such as current events or the contents of official documents." Within the meaning of the section, official documents include "country conditions reports prepared by the Department of State, including its foreign policy expertise, analysis and opinion." *See* 67 Fed. Reg. 54878-01, 54892 (Aug. 26, 2002). The Circuit Courts of Appeals differ, as noted *supra*, as to the appropriate substantive context within which the Board of Immigration appeals may properly take administrative notice of a finding set forth in country report. The Court of Appeals for the Seventh Circuit has held that the Board of Immigration may take administrative notice of changed country conditions so long as the fact noticed is noticed is not blindly applied, and the Board remains engaged in an individualized review of the applicant's case. *Useinovic v. INS*, 313 F.3d 1025, 1030-31 (7th Cir. 2002) (*affirmed* Board of Immigration Appeals' denial where the Yugoslavian government that was the basis for applicant's fear is no longer in power.) Other Circuit Courts of Appeals have held that administrative notice without a remand for an evidentiary hearing is only appropriate where there exist uncontroverted facts concerning asylum in the applicant's native country. *Galina v. INS*, 213 F.3d 955, 958-59 (7th Cir. 2000) (*finding* that the

Board of Immigration Appeals had misapplied the principle of administrative notice by relying on opinions in the Country Reports and treating them as uncontested facts.). In *Fergiste v. INS,* 138 F.3d 14, 17-19 (1st Cir. 1998), the Court of Appeals for the First Circuit itself rejected the Board of Immigration's employ of simple administrative notice and citation to *Matter of E-P-,* 21 I&N Dec. 860 (BIA 1997) as a basis for rebutting a claim of past persecution where the applicant presented evidence of continuing problems in Haiti. The Court should have rejected the Board's decision to take administrative notice of the facts in the record regarding the country conditions in Albania.

Even where the country report finding is substantively appropriate for administrative notice, such notice may nonetheless be improper if introduced at the appellate stage of proceedings where the introduction of new evidence is precluded, and violative of the alien's right to Due Process if the alien, as here, is deprived of the right to respond to the administratively noticed finding. *See Getachew v. INS,* 25 F.3d 841 (9th Cir. 1994) (*finding* that due process was violated even where the Immigration and Naturalization Service's brief to the Board of Immigration Appeals stated changed circumstances because the Board of Immigration Appeals does not allow new evidence to be presented to it); *Castillo-Villagra v. INS,* 972 F.2d 1017 (9th Cir. 1992) (*reversed* Board of Immigration Appeals decision that took administrative notice of adjudicative facts and not merely legislative facts without providing applicant an opportunity to rebut.)

In its decision denying the Moli's appeal of the Immigration Judges's denial of asylum, the Board of Immigration takes administrative notice of the changes in the political conditions in Albania as set forth in the 2005 Department of State Country Report on Albania. Furthermore, in its decision affirming the decision of the Board of Immigration Appeals and denying the Molis' petition for review, the Court of Appeals for the First Circuit

held that the Board of Immigration Appeals was correct to rely on the United States Department of State Profile and Background Notes for Albania for the year 2005, despite the fact that this report came into existence *after* the record of proceedings was closed. In this case, a serious error was committed in view of the fact that the Board of Immigration Appeals' ultimately based its decision on a State Department report, issued *after* the record of proceedings was closed, without any regard to countervailing country conditions reports which the Petitioners might have presented in response had they not been deprived of such opportunity. The Court of Appeals for the First Circuit's affirmance of the Board's failure to allow for the opportunity to submit countervailing reports violated its own precedent, and was in contravention of the concerns raised by its sister circuits, thus depriving the Molis of their right to Due Process pursuant to the Fifth Amendment. *See Adjin v. Bureau of Citizenship and Immigration Services,* 437 F.3d 261 (2nd Cir. 2006); *De La Llana-Castellon v. INS,* 16 F.3d 1093, 1099-1100 (10th Cir. 1994); *Castillo-Villagra v. INS,* 972 F.2d 1017, 1029 (9th Cir. 1992). In view of the widespread use of Department of State country reports, and the dissention amongst the circuit courts as to the propriety of taking administrative notice of findings set forth in these reports, there exists a very real risk that aliens such as the Molis will be subject to an institutional deprivation of their right to due process within the context of their removal proceedings. The review of this Honorable Court is thus warranted to ensure that the constitutional safeguards afforded to such individuals as set forth in the Fifth Amendment are preserved.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure the opportunity for the Moli family to have the merits of their appeal reviewed by the Supreme Court of the United States.

Respectfully submitted,

CHRISTOPHE & ASSOCIATES, P.C.

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**Counsel of record*

August 6, 2007

United States Court of Appeals
For the First Circuit

[DATE STAMP]
2007 MAY -7 P 1:26
FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-2413

ANDRI MOLI, ET AL.,

Petitioners,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

Before
Boudin, Chief Judqe,
Campbell, Senior Circuit Judge,
and Lynch, Circuit Judge.

ORDER OF COURT

Entered: May 7, 2007

The petition for panel rehearing is denied.

By the Court:

Richard Cushing Donovan, Clerk.

By: /s/ _____
Chief Deputy Clerk.

[cc: Messrs: Milch, Sullivan, Furlong, Ms. Bing, Ms. Wong and Ms. Blaya]

MANDATE

United States Court of Appeals
For the First Circuit

[DATE STAMP]
2007 MAY 15 A 7:33
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US COURT OF APPEALS
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ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

Before

Boudin, Chief Judge,
Campbell, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT

Entered: March 12, 2007

After careful review of the record and the petition for review, we conclude that substantial evidence supports the BIA's decision. *See Tota v. Gonzales*, 457 F.3d 161, 165 (1st

Cir. 2006) (reciting standard of review). We add only the following comment. The BIA properly relied on evidence of changed country conditions in Albania in finding that petitioners had failed to establish a well-founded fear of future persecution. *See, e.g., Alibeaj v. Gonzales*, 469 F.3d 188, 193 (1st Cir. 2006).

The petition for review is denied. *See* 1st Cir. R. 27.0(c).

Certified and Issued as Mandate
under Fed. R. App. P. 41.
's/
Deputy Clerk
Date: May 15, 2007

By the Court:

Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Messrs: Milch, Sullivan, Furlong, Ms. Bing, Ms. Wong and Ms. Blaya]

United States Court of Appeals
For the First Circuit

No. 06-2413

ANDRI MOLI, ET AL.,

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Before

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JUDGMENT

Entered: March 12, 2007

After careful review of the record and the petition for review, we conclude that substantial evidence supports the BIAis decision. *See Tota v. Gonzales*, 457 F.3d 161, 165 (1st Cir. 2006) (reciting standard of review). We add only the following comment. The BIA properly relied on evidence of changed country conditions in Albania in finding that petitioners had failed to establish a well-founded fear of future persecution. *See, e.g., Alibeaj v. Gonzales*, 469 F.3d 188, 193 (1st Cir. 2006).

The petition for review is denied. *See* 1st Cir. R. 27.0(c).

By the Court:

Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Messrs: Milch, Sullivan, Furlong, Ms. Bing, Ms. Wong and Ms. Blaya]

U.S. Department of Justice
Executive Office for Immigration Review

[DOJ SEAL]

Board of Immigration Appeals
Office of the Clerk

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P.O. Box 8728
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Name: MOLI, ANDRI A95-477-484
Riders: 97-485-539 97-485-540

Date of this notice: 09/08/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/

Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

.S. Department of Justice
ecutive Office for Immigration Review
lls Church, Virginia 22041

Decision of the Board of Immigration Appeals

les: A95 477 484 - Boston
A97 485 539
A97 485 540

Date: SEP -8 2006

re: ANDRI MOLI
VITORI MOLI
FISNIK MOLI

REMOVAL PROCEEDINGS

PPEAL

N BEHALF OF RESPONDENTS: James A. Lombardi, squire

HARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law (all respondents)

PPLICATION: Asylum; withholding of remova; relief under the Convention Against Torture

In a decision dated March 10, 2005, an Immigration dge denied the respondents' applications for asylum and ithholding of removal pursuant to sections 208(a) and 241

(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, and their request for relief under the Convention Against Torture. *See* 8 C.F.R § 1208.16 (2006). The respondents' appeal will be dismissed.

The respondents, natives and citizens of Albania, argue on appeal that the Immigration Judge erred in his adverse credibility finding and that they established past persecution on account of their political involvement with the Democratic Party (Respondents' Br. at 4-6, 8-9). As an initial matter, we choose not to address the Immigration Judge's credibility determination (I.J. at 10). *See* 8 C.F.R § 1003.1(d)(3)(i). We find that the respondents, even if deemed credible, have not met their burden of establishing eligibility for relief. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Most significantly, we find that the respondents' mistreatment in Albania does not rise to the level of persecution as contemplated by the Act and that there is insufficient evidence in the record to indicate that they have an objectively reasonable well-founded fear of persecution (I.J. at 4-12).

Specifically, the respondents' asylum claim rests primarily on two attacks allegedly suffered by the lead respondent ("respondent") and his father, Mr. Moli – who remains in Albania and is not included in the current application for asylum – in March of 1999 and December of 1998, respectively (I.J. at 4-5; Exh. 3). With respect to the latter, Mrs. Vitori Moli contends that her husband, Mr. Moli, was beaten by the "secret police of the socialist-communist government" after returning from a political demonstration and subsequently hospitalized for five hours (I.J. at 4; Exh. 3; Tr. at 28-30). The respondent similarly claims that he was attacked on the way home following a Demotratic Party meeting and was hospitalized for 5 hours (I.J.-at 5, 8; Exhs. 3, 3-A). However, the respondent failed to address the

Immigration Judge's finding that he was unable to identify the assailants that attacked him (I.J. at 10-12; Exhs. 3, 3-A). *See Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997) ("Because the burden of proof is on the alien, an applicant should provide supporting evidence" for facts pertaining to his claim, or an explanation should be given as to why such information was not provided). Although the respondents further alleged that they received anonymous threatening phone calls in addition to these two events (I.J. at 5, 8-9; Tr. at 30-31), we are unable to find that the above mistreatment rises to the level of persecution. *See Nelson v. INS*, 232 F.3d 258, 265 (1st Cir. 2000) (stating that in order to qualify for relief, an applicant must show mistreatment beyond "harassment and even basic suffering"); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998). Further, given the lack of details regarding the identity and supposed motive of the assailants in the second attack, we conclude that the respondent failed to establish a nexus regarding the abuse suffered and a protected ground under the Act. *See INS v. Cardoza-Fonseca, supra; see also Nelson v. INS, supra*, at 263 (*citing Ravindran v. INS*, 976 F.2d 754, 756-60 (151 Cir. 1992) and observing that persecution was not found in that case where a member of a "minority ethnic group had been interrogated and beaten for three days in prison and warned about pursuing political activities").

We also find that the respondents failed to demonstrate a well-founded fear of future persecution. For example, the respondents' brief does not meaningfully address the Immigration Judge's finding that despite fearing further abuse in Albania, the respondent temporarily visited Greece only to voluntarily return (I.J. at 7, 9-10; Tr. at 92). The respondents also have not indicated that Mr. Moli, despite being previously targeted in a politically-motivated attack, is facing further abuse in Albania. *See Matter of A-E-M-*, 21 I&N Dec. 1157, 1160 (BIA 1998) (holding that the

continued residence of an applicant's family in the country from which he seeks relief reduces the reasonableness of his fear of persecution). Moreover, we find no clear error in the Immigration Judge's appraisal of the country conditions in Albania with respect to the respondents' asylum claim (I.J. at 10-11). *See Nelson v. INS, supra*, at 264. Although the respondents contend that the Immigration Judge's assessment of the country conditions – which found that despite the Socialist Party's control of the government during the periods of the respondents' alleged mistreatment and the Immigration Court proceedings, there was no indication that it employed a repressive or violent strategy against its opponents (I.J. at 11; Exh. 8) – was "not correct" (Respondents' Br. at 9), they fail to specifically illustrate or otherwise document governmental abuse against members of the Democratic Party. Additionally, we take administrative notice of the fact that after the Immigration Judge closed the hearing, the United States Department of State released their 2005 Profile and Background Notes for Albania, which found that the "Democratic Party and its allies returned to power in a decisive victory" following the July 3, 2005, general elections, and that "[t]heir leader. Sali Berisha, was sworn in as Prime Minister on September 11, 2005." *See* Department of State's 2005 *Profile and Background Notes for Albania; see also Gebremichael v. INS*, 10 F.3d 28, 37 (1st Cir. 1993)(stating that the Board is free to take administrative notice of facts "such as a change in government in an applicant's home country"); *Matter of R-R-*, 20 I&N Dec. 547, 551 (BIA 1992) (recognizing the power of administrative agencies to take administrative notice of commonly-known facts).

Based on the foregoing, we affinn the Inunigration Judge's decision that the respondents failed to meet their burden of proof for asylum. We also find that the respondents failed to establish that it is "more likely than

not" that they will suffer persecution or torture if returned to Albania, and therefore, we will deny their applications for withholding of removal and for relief under the Convention Against Torture (I.J. at 12-13). *See INS v. Cardoza-Fonseca, supra; Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). Accordingly, the respondents' appeal will be dismissed.

ORDER: The respondents' appeal is dismissed.

/s/
FOR THE BOARD

UNITED STATES IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203-0002

IN THE REMOVAL CASE OF MOLI, ANDRI
RESPONDENT

CASE NO.: A95-477-484

ORDERS

[X] This is a memorandum of the Court's Decision and Orders entered on March 10, 2005. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. ( ) Both parties waived issuance of a formal oral decision in the case.

[X] The respondent was ordered REMOVED from the United States to Albania ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____.

[ ] Resondent's application for VOLUNTARY DEPARTURE was GRANTED until _____. upon posting a voluntry departure bond in the amount of $_____ to INS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to INS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[X] Respondent's application for ASYLUM was ( ) granted (X) denied
( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[X] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted (X) denied ( ) withdrawn with prejudice.

[X] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted (X) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFEERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203b of NACARA, ( ) 240ACa ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted (X) denied ( ) withdrawn with prejudice. If granted, it was ordered that the INS issue all appropriate documents ncessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section _____ was ( ) granted ( ) denied ( ) withdrawn or ( ) other _____. ( ) The conditions imposed by INA section 216 on the respondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section ____ of the ( ) INA ( ) NACARA ( ) _____ was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that INS issue all appropriate documents necessary to give effect to this Order.

[ ] Respondent's status was RESCINDED pursuant to the INA section 246.

[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of INS, then the alternate Order of removal shall become immediately effective without further notice or procedings the respondent shall be removed from the United States to _____.

[ ] Respondent was ADMITTED as a _____ until _____. As a condition of admission, the respondent was ordered to post a $_____ bond.

[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice ( ) ADMINISTRATIVELY CLOSED.

[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.

[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d).

[ ] If you are under a final order of removal and if you willfully fall or refuse to 1) depart when and as required, 2) make timely applicatlon in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 2740(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and or imprisoned for up to 10 years. INA section 243(a)(1)).

[ ] Other:

_____

_____

Date: Mar 10, 2005 /s/ _____
FRANCIS L. CRAMER, Judge

APPEAL: ( ) waived ( ) reserved (X) by Respondent
( ) INS ( ) Both

DUE BY: 4/11/05

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
[ ] MAIL [X] PERSONAL SERVICE

TO: [X] INS [ ] ALIEN [X] Alien's ATT/REP
[ ] ALIEN c/o Custodial Officer

DATE: 3/10/05 BY: [ ] COURT STAFF
[X] JUDGE /s/ _____

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File A 95 477 484; March 10, 2005
File A 97 485 539;
File A 97 485 540

In the Matter of

ANDRI MOLI; IN REMOVAL PROCEEDINGS
VITORI MOLI;
FISNIK MOLI;

Respondents

CHARGE: Section 237(a) (1) (B) of the Immigration and Nationality Act in that respondents after admission as nonimmigrants under Section 101(a) (15) of the Act have remained in the United States for a time longer than permitted.

APPLICATIONS: Asylum, withholding of removal, withholding of removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT:

James Lombardi, Esquire

ON BEHALF OF THE SERVICE:

Gwen Tregerman, Esquire

Department of Homeland Security
Boston, Massachusetts

ORAL DECISION OF THE IMMIGRATION JUDGE

Introduction

The respondent Andri Moli is a 22-year-old citizen and native of Albania. He files for asylum along with his mother, Vitori Moli, a 43-year-old citizen and native of Albania, and Andri's brother, also the son of Vitori, an 18-year-old citizen of Albania. The Government has charged the respondents in a Notice to Appear with violation of the Immigration and Nationality Act as referenced above. The respondents, through counsel, have admitted the allegations and conceded the charges. Accordingly, the Court finds by clear, convincing, and unequivocal evidence that respondents are removable and designates Albania as the country of removal. Respondents have applied for relief in the form of asylum under Section 208 of the Immigration and Nationality Act. Applications for asylum shall also be considered applications for withholding under Section 241(b) (3) of the Act. The Court also considers respondents application for withholding of removal under the Convention Against Torture.

Statement of the Law

The burden of proof is upon the respondents to show that they are eligible for asylum or withholding of removal. To qualify for asylum under Section 208 of the Act, the respondents must show that they are refugees within the meaning of Section 101(a) (42) (A) of the Act. In order to meet the statutory standard of eligibility for asylum, the respondents must satisfy by credible evidence each of the following four elements in the definition of refugee created by Section 101(a) (42) (A) of the Act: the respondents must

have a fear of persecution; the fear must be based on pa persecution or a well-founded fear of persecution in tl future; the persecution feared must be on account of rac religion, nationality, membership in a particular soci group, or political opinion; and the respondents must l unable or unwilling to return to the country of nationali because of countrywide persecution.

If there is a finding of past persecution, then there is presumption of a well-founded fear of future persecutio The burden then shifts to the Government to show a chang of cond~tions that would rebut the presumption. However, the Court finds no past persecution, respondent can still g asylum based on a fear of future persecution if respondent can show genuine fear on a subjective basis plus, on a objective basis, that a reasonable person in respondent circumstances would fear persecution.

Summary of the Evidence

The respondent Andri Moli testified at the hearing o the merits as did his mother, Vitori. Both Andri and Vito also submitted written statements in support of thei applications for asylum. Fisnik's application for asylun appears to be a derivative of his mother Vitori's and rises an falls on the Court's finding in her case.

Vitori was the first to testify and stated that she wa born on March 12, 1961, in Albania and married Ilirjan Mol in May of 1982. She entered the United States on March 5 2003.

Vitori testified that she is a member of th organization of formerly persecuted people as well as a member of the Democratic Party in Albania since 1993. She asserts that her husband and her eldest son, Andri, are alsc members of the Democratic Party.

Respondent testified that she has been attending meetings and demonstrations along with women in support of the Democratic Party, and her son Andri became a Youth Forum member as well as attending meetings and demonstrations with his father as well. She asserts that hers husband is one of the first Democratic Party activists whose responsibility was to convince people to join.

When asked whether she had problems in Albania, she described two incidents. The first involved a demonstration in which her husband participated and was beaten by police on December 12, 1998. Respondent said she attended the demonstration with her husband after which she returned home with her son and her husband went to a friend's house. On his way home, the husband was confronted by police and respondent learned subsequently from witnesses that her husband had been hospitalized as a result of beatings from the police.

Respondent claims she saw wounds on her husband's head and shoulders. He was released five hours after the fact and returned home.

Thereafter they went to the home of respondent's brother where they stayed for eight days. After returning home, they began getting anonymous calls, which continued for three or four months. The caller would ask, "why are you going to demonstrations? You don't have to go. Take care of yourself." The calls were from an unknown origin. Respondent believes they were made by the secret police.

The second incident took place on March 10, 1999, and involves respondent Andri. He attended a demonstration and on the way home a car with no plates containing occupants wearing masks began insulting him and then beating him with "rubber sticks." Respondent received a phone call informing her that her son was in the hospital.

Again, they were able to obtain his release after five hours. Respondent stated that he had facial wounds which were treated by application of ice.

Respondent further that thereafter they began seeing the secret service "all the time" and decided to leave during the year 2000. Respondent testified that they remained in hiding and moving from house to house and that "nobody knew where we were." Respondent was asked if it was the police or secret police that wanted to harm her and she acknowledges that she assumes it is the police or the secret service. She claims that they are motivated to harm her because of her family's activities supporting the Democratic Party.

On cross-examination, the respondent was asked about her Democratic Party credentials. Specifically, the inquiry involved questioning why she had no Democratic Party documents issued before she came to the United States. Respondent stated that she left all her documents at home. It was pointed out to respondent that the birth certificate she submitted to the Court was issued after she came to the United States and has her picture. It was further pointed out to respondent that the very same picture was used for her Democratic Party membership card. Respondent replied that her sister had obtained the picture from her home for use on the birth certificate. The use of the same picture on the Party membership card was not explained. Respondent conceded that she misrepresented her reasons for coming to the United States by claiming that her younger son needed medical treatment. She apologized for not telling the truth. She admitted providing the Embassy with fraudulent documents alleging that son Fisnik had heart problems.

Respondent was also questioned closely about the newspaper accounts filed as exhibits (Exhibit 5, Tab 15, and Exhibit 5, Tab 16), which the Government contends are

fraudulent in that they appear doctored. Respondent denies that the newspaper exhibits are fraudulent and insists they are genuine. There being no expert testimony with regard to the genuineness of the newspaper accounts, the Court will not give any weight to this issue.

Respondent was asked whether Andri had traveled anywhere before he went to the United States. Respondent conceded that Andri had traveled to Greece and then voluntarily returned to Albania prior to traveling to the United States. When asked why Andri would voluntarily return to Albania if he feared for his safety, the respondent was not responsive. Respondent was then asked whether the Albanian government did not have to cooperate with Andri in order to effect his trip to the United States as an exchange student. Again the respondent was not responsive. Respondent conceded that the Albanian government issued Andri a passport with his true name and picture in July of 1999. Respondent also conceded that her passport issued by the Albanian government contained her true name and photograph in 2002 and that she had no trouble obtaining this passport from the Albanian government during a time when she was allegedly in hiding.

With regard to the police attack on Andri, respondent denied injuries to Andri's arms or his legs but stated that he lost consciousness. Respondent testified that Andri was unconscious when taken to the hospital. When asked why this loss of consciousness was not mentioned in the hospital record, respondent did not know. Respondent testified that Andri suffered a swollen face, bloody nose and bruises on the back. Injuries to respondent's back are not mentioned in the medical record.

The next witness to testify was respondent Andri Moli. Andri testified that he was born on November 2, 1982, and came to the United States on August 9, 1999, on a

student visa. With regard to his involvement in politics in Albania, respondent testified that he joined the Youth Forum of the Democratic Party and then ultimately joined the Democratic Party in May of 1996. During 1996 and 1997, he distributed posters and fliers and took part in protests for the Democratic Party.

Respondent encountered problems in March of 1999 when he was returning home from a protest. He claims to have been stopped by masked attackers at which time he was dragged, beaten, and insulted. The attackers used sticks and respondent was caused to lose consciousness, waking up in a hospital. He remembers being told he was "dead" if he continued with the Democratic Party. He remained in the hospital for five to six hours where his mother and father visited him.

Respondent was asked if he had any problems after this incident of March 1999. Respondent testified that he lived with his cousin Bujges in the village of Elbasan because he feared another attack. He remained with his cousin until he left for the United States in August of 1999.

Vitori claims that the same thing happened to his father in December 1998 and that he saw his father in the hospital in "bad condition."

Respondent filed for asylum in February 2002 at the age of 19. He says he did so because his father told him it wasn't safe to return to Albania and that his family was still moving from house to house yet receiving threatening calls. When asked who the tormentors were, respondent replied he that believed they were the police, who had told him he would be killed if he continued with the Democratic Party.

As with Vitori, respondent received identifying documents after the fact from Albania. Respondent testified

that his birth certificate, his Democratic membership card, and his Democratic Party Youth Forum confirmation were all mailed to him by his cousin.

Respondent claims that Albania is not safe because the Socialists want to harm him because he and his father and mother were leaders in the Democratic Party.

On cross-examination, respondent testified that his March 1999 injuries were to his head and chest. When asked about back injuries, he acknowledged bruises on the back. He was asked if he reviewed the medical report, and he acknowledged it to be true and accurate. When asked why the doctor did not mention the back injury, the respondent stated that he knew he had back injuries.

Respondent was questioned about leaving Albania for Greece and then returning voluntarily to Albania. The Government inquired as to why he would return to Albania if he was in danger. Respondent testified that he went back to get his stuff and meet his parents. When asked about the Albanian government providing school records, respondent testified that he had a private teacher. When asked whether he encountered difficulty in obtaining a passport, he claimed he didn't know. His plan was to get out of Albania as fast as possible.

With regard to his assailants in March of 1999, respondent testified that he was walking down the street and that the assailants did not identify themselves in any way.

Findings and Analysis

The threshold matter for the Court's consideration is the credibility of the respondents. The Court finds that for various reasons, both respondents' testimony was not credible. With regard to Vitori Moli, there was no testimony

to the effect that Vitori Moli was injured or attacked in any way and had any need for haste in leaving Albania. Nevertheless, she claims she left all her Democratic Party credentials and other identifying documents at home. When asked direct questions about Andri's visit to Greece and voluntary return to Albania, she was not responsive, nor did she candidly reply to the inquiries regarding the need for cooperation from the Albanian government for Andri's trip to the United States as an exchange student as well as the issuance of passports to Andri and to the respondent. The story given by both Andri and Vitori, that they had to remain in hiding from the Albanian police or secret service while at the same time they were arranging for a student exchange and passports, is simply not consistent.

In addition, the stories of both Andri and Vitori are inconsistent with the country conditions as they are known to exist in Albania since the turn of this century. The Government submitted the State Department Profile of Asylum Claims and Country Conditions in Albania for March 2004 (Exhibit 8). This report states, "There are no indications that the Socialist Party either through its own organization or through government authorities is engaged in a pattern of repression or violent behavior against its opponents." At the time respondents were in Albania, and at the present time, the Socialist Party controls the government. The Court also notes that this report states, "The Democratic Party resumed participation in Parliament in early 2002. Municipal elections in October 2003, although hotly contested, were also generally free of violence . . . There were no cases of politically motivated killings in the period 2001 to 2003." Given the situation in Albania at the time, wherein political violence had essentially abated, it is not credible to assert that respondents, who had no expressed standing of importance or leadership in the Democratic Party, would have to spend their lives in hiding from political enemies.

The Court also notes that, other than attending demonstrations and supporting the Party, respondents did not describe any activities on their part that would tend to incite political enemies to vengeance. No activity is described other than participating in the political process.

The Court also notes that the identity of the individuals who made the alleged attacks remains a mystery. With respect to the attack on Andri, he was never able to identify his assailants. As for Vitori, she was never attacked and only suffered some threatening phone calls for a period of three months. It is also significant that the events complained of took place in 1998 and 1999, yet Vitori did not enter United States until March of 2003, and Andri did not apply for asylum until 2002.

Having made these findings, the Court makes the further finding that the respondents have not met their burden of proof with regard to their claim for asylum which requires credible testimony in support of their claim to be refugees under the law of asylum. Accordingly, their applications for asylum are hereby denied.

Since respondents have failed to meet the more lenient standard with regard to asylum, it follows that they cannot meet the more stringent standard for withholding of removal. Accordingly, their applications for withholding of removal under Section 241(b) (3) of the Act are denied.

With regard to any claim for withholding of removal under the Convention Against Torture, respondents had the burden to show that it is more likely than not they would be tortured should they return to Albania. In addition, such torture would have to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It is not clear that the alleged tormentors were government officials, and it does

not appear that they were ever identified as such by the respondents apart from suspicion. Under these facts, the Court cannot say that it is more likely than not that either of the respondents will be tortured by a government official should they return to Albania. Accordingly their applications for withholding of removal under the Convention Against Torture are denied.

ORDER

IT IS HEREBY ORDERED that respondents' applications for asylum under Section 208 of the Act are denied.

IT IS FURTHER ORDERED that respondents' applications for withholding of removal under Section 241(b) (3) of the Act are denied.

IT IS FURTHER ORDERED that respondents' for withholding of removal under the Convention Against Torture are denied.

IT IS FURTHER ORDERED that the respondents be removed to Albania.

_____

FRANCIS L. CRAMER
United States Immigration Judge